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ABSTRACT

The concept of a United States citizen's right to receive information is acquiring increased judicial recognition. This report traces the evolution of that right from its philosophical basis in the United States Constitution, through its interpretation by the Supreme Court, up to the current concern that the public receive certain economic information, such as drug prices and lawyers' and physicians' fees. An examination of pertinent court cases shows that the Supreme Court has not treated the right to receive in a theoretically consistent manner. The paper concludes that the press must continue its role as the public's proxy in examining how the right to receive is exercised. (RL)

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FREEDOM OF INFORMATION CENTER REPORT NO. 380

RIGHT TO RECEIVE

This report was written by Richard Obern, an M.A. candidate at the University of Missouri School of Journalism.

Introduction

A popular government, without popular information, or means of acquiring it, is but a prologue to a farce or tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

(Letters and Other Writings of JAMES MADISON)

James Madison thus expressed the concept of freedom of communication that the Constitution's framers sought to embody in the First Amendment. That communication concept is contained today in the phrase "the public's right to receive," the topic of this paper.

The paper begins by considering the general theory of the First Amendment as it applies to freedom of speech, establishing the basis for the growing judicial recognition of the public's right to receive. No recourse to enumeration of specific cases will be applied in this first general section. Secondly, the genesis of the right to receive, early case history and philosophical underpinnings will be discussed. The broadening of the basic idea by the courts to cover many different situations will be discussed, including the use of the mails, the right to hear, the concept's application to broadcast media and the most recent applications to commercial speech.

Philosophy

The right of freedom of expression in the United States draws its life from the Constitution's First Amendment. But the necessity for free political thought is further grounded in the rational thinker's concept of "... the right of an individual purely in his capacity as an individual."¹ Western thought holds that the proper end of man is the realization of his potentialities as a human being. Thomas Emerson says:

Achievement of self-realization starts with development of the mind. Hence suppression of belief,

opinion and expression is an affront to the dignity of man, a negation of man's essential nature.²

The Miltonian concept applies: "To suppress is to reject the basic human desire for recognition and affront the individual's worth and dignity."³

Secondly, and within the legal framework, freedom of expression is justified by the unique form of representative federal government chosen by our forefathers. Some scholars maintain that the First Amendment is founded on a theory of political justification: that the free discussion of ideas and thoughts depends upon both uninhibited speakers and listeners. Dependence is placed totally on the individual in his capacity as a member of society. The Declaration of Independence states that governments derive "their just powers from the consent of the governed." Although people transfer the power of self-government to a national government, it is the people who ultimately are the governors and not the governed. Therefore, citizens must have sufficient information to make knowledgeable decisions in elections, thereby exercising effective control of the nation's affairs. Society and state exist to serve the individual. The First Amendment merely arms the people with the means to perform their governing functions.

Freedom of expression becomes both the individual's and society's goal because it is the best process for advancing knowledge and discovering truth. On one occasion, the Supreme Court put it this way:

The very purpose of the First Amendment is to foreclose authority from assuming the guardianship of the public mind through regulating the press, speech and religion; it rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.⁴

In protection of free speech and press, every man must look out for himself. "In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."⁵ We must consider if we wish to be mentally protected. Requesting such protection would be "an ad-

Summary:

The concept of the right of people to receive information is acquiring increasing judicial recognition. This report briefly traces the evolution of the concept from its philosophical basis through interpretation by U.S. courts of law to the current concern that the public receive certain economic information.

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mission that we are intellectually and morally unfit to play in what Justice Holmes has called the 'experiment of self-government.'⁸ Free citizens consent to public policy decided by corporate actions. Decisions are equally binding on all citizens, since the government is a "voluntary compact among political equals."⁷

This theory of the First Amendment suggests that the matter of ultimate interest is not the words of the speakers but the minds of the listeners. For it is in those minds that the governing decisions must be formulated. Those who decide issues should understand them. But, while Socrates in Plato's *Apology* defends his freedom to speak, he does not say that every individual has an unalienable right to speak whenever, wherever and however he chooses. And the First Amendment does not guard unregulated talkativeness.

The First Amendment creates a demand for open discussion. That demand requires that "every relevant fact . . . be brought out," that "every opinion and every insight . . . be available for consideration."⁸ Accepting the aim of society as truth, toward allowing better self-government, Justice Oliver Wendell Holmes said in *Abrams v. U.S.* that ". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."⁹ Meiklejohn harkened back to the rational man and said, "free men need truth as they need nothing else."¹⁰ It is vital that no information be denied a hearing because it is on one side of an issue rather than another. "Conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant."¹¹

The First Amendment is caring for common public needs. There is no lack of court dicta to support the need for the unrestricted flow of information in a democratic society. "There is an important public interest in the publication of information."¹² "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period."¹³ "The constitutional protection does not turn on truth, popularity or social utility of ideas and beliefs which are offered. . . ."¹⁴

The essential principle of the First Amendment is expressed in Justice Harry A. Blackmun's ruling opinion in *Bigelow v. Virginia*:

The policy of the First Amendment favors dissemination of information and opinion, and "the guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . .' (cite)."¹⁵

The rights granted the press are those granted all citizens in this society. "Those guarantees are not for the benefit of the press so much as for the benefit of all of us."¹⁶ Meiklejohn said that the primary concern of a newspaper is not in dissemination of news but in the public's acquiring it.

We have measured the dangers and the values of

the suppression of the freedom of public inquiry and debate. And on the basis of that measurement, having regard for the public safety, we have decided that the destruction of freedom is always unwise, that freedom is always expedient.¹⁷

Thus, the basic theory of the right of all members of a society to form their own beliefs and communicate them freely to others is regarded as an essential principle in a democracy. Speakers and listeners are accorded society's rights and burdens. Justice Thurgood Marshall's dissent espoused the "wholeness" concept in *Kleindienst v. Mandel*: "The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin."¹⁸ This is bedrock "right to receive." However, Emerson says: "the basic theory carries beyond the political realm. Freedom there is usually a necessary condition for securing freedom elsewhere."¹⁹

The Right to Receive

Consider, What is the public's right to receive? As stated above, the First Amendment gives, indeed demands, this right for all members of a democratic society. The citizenry as a whole needs to receive information in order to perform its governing functions. Meiklejohn describes this collective public interest as

not another different interest superimposed upon our individual desires and intentions. It is compounded out of them. It includes nothing which is not included by them. The common purpose is made up out of the separate purposes of the citizens.²⁰

The public's right to be informed does not extend semantically to Jerome Barron's "right to access."²¹ Barron maintains that the draftsmen of the First Amendment and early proponents of its "marketplace" interpretation could not have envisioned the difficulties caused by mass media's changing technology. Today's high speed information dissemination negates the latter day step-ladder approach to decision-making. There is a tendency for politics to move away from representation. Barron says, "The contemporary structure of mass media directs the media away from rather than toward opinion-making."²²

Barron seems to be stretching the First Amendment's fabric to "opinion-making" rather than opinion-informing. Meiklejohn says that the citizenry should be informed, not that it should be the object of propagandizing. The press must meet the citizens' need to be informed, but not attempt to shape individual rationalities. Barron believes Meiklejohn and Emerson both espouse an outdated romantic view of the First Amendment: "A realistic view of the First Amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications."²³ Barron advocates governmental mandated access to newspapers much the same as broadcasters are bound to provide outlets for "controversial issues of public importance." The basic difficulty with governmental control and regulation is the inescapable conclusion that the First Amendment would be turned upside down. The Bill of Rights sharply and explicitly defines the boundaries beyond which governing acts may not go. "Congress shall make no law . . ." (emphasis added).

The Supreme Court refused to sanction Barron's right to access idea in *Miami Herald Publishing Co. v. Tornillo*²⁴ because it would imply just such a law regarding the press. Admittedly, there is some merit to Barron's idea, given the current state of the media in the U.S. But the fear remains, as it did with our forefathers, that once controls begin, no matter how lofty their purpose, we will abrogate our rights and duties as citizens.

The public's right to receive is not equivalent to the right of access. The courts have applied some synonyms: "right to be informed," "right to know" and "right to hear."²⁵ *AP v. U.S.* put it most bluntly: "The basic function of the First Amendment . . . can only be the right to receive information from diverse and antagonistic sources."²⁶ Though the words seem to confer a straightforward enough meaning, in a well-governed society a legislature has both the right and the duty to prohibit certain forms of speech (libel, slander, incitement), but only where state interests are involved would there be justification for limitations of other First Amendment rights. The struggle is unending, in our complex environment, to obtain adequate information on matters directly affecting our well-being. Obstacles are posed by

private organizations fearful that accurate information in the hands of the public will lead to altered consumption or thought patterns, or by laws that defer either to once legitimate state interests or to special interest pressures.²⁷

The courts have reacted slowly in some areas with regard to the right to receive. However, judicial response to varied issues posed in the context of the First Amendment lends credence to the argument that such a right does exist.

Recognition of the Right

The Supreme Court has not treated the right theoretically in a constant manner. The text below will focus on several instances where it was treated and the implications thereof. The cases encompass broad, general areas including the receipt of information through the mails, the right to possess obscene materials, the right to hear in schools and via broadcasts, and the consumer's right to receive via advertisements. Generally, the right to receive does not contravene former regulation of certain speech, but

a violation of the right to receive may give the injured party standing to sue and result in a suit during which the court can view the full range of interests of the speaker and the listener in uninhibited communication.²⁸

Judicial recognition of the right to receive had its genesis in *Martin v. Struthers*.²⁹ A municipal ordinance in Struthers, Ohio, forbade a person to knock on doors, ring doorbells or otherwise summon a residential occupant to the door for the purpose of giving him a handbill or circular. The Supreme Court reversed the conviction of a Jehovah's Witness. Further, in the ruling opinion Justice Hugo Black said that the ordinance abridged First Amendment freedoms: "This freedom embraces the right to distribute literature and necessarily protects the right to receive it."³⁰ Justice Black recalled both the general philosophy of the First Amendment stated above and

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the need for overriding state interests to regulate types of speech.

The freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.³¹

After all, the recipient may be glad to receive the information:

Whereas *Martin* explicitly enunciated the right to receive, one previous case, *Schneider v. State*,³² implied such a right. Again, distribution of handbills, a popular and inexpensive method of information dissemination at the time, was the contested issue. A Los Angeles ordinance prohibited distribution of handbills on its public streets. For the Court, Justice Owen Roberts recognized the fundamental rights of freedom of speech and press and stated:

We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an order which prohibits a person rightfully on a public street from handing literature to one willing to receive it.³³

Earlier that same year, 1939, the Court had emphasized the right of the public to use public streets and parks to communicate views in *Hague v. CIO* (307 U.S. 496). The theory that free discussion of ideas and thoughts depends upon both uninhibited speakers and listeners thus gained acceptance in Supreme Court dicta.

In *Stanley v. Georgia*,³⁴ the Court agreed that a statute making possession of obscene materials criminal abridged First Amendment rights. Stanley's alleged book-making led to issuance of a search warrant. Three reels of 8mm film were all the law officers found of any interest. After they reviewed the films, Stanley was arrested for possessing obscene matter. The lower court reasoned that since, according to *Roth v. U.S.*, obscenity was not within the area of constitutionally protected speech or press,³⁵ states were free to deal with it as they deemed necessary, as they deal with other things thought to be detrimental to the welfare of citizens. Georgia argued that if the state could take measures to protect the body (drug laws, safety regulations), it might also protect the mind. (Recall Meiklejohn's admonition against such mind control above.) *Roth* does not directly apply here since it dealt with use of the mails to distribute obscene matter. But the government's valid interest in dealing with the problem of obscenity can not always be insulated from all constitutional protections.

It is now well established that the constitution protects the right to receive information and ideas. This freedom . . . necessarily protects the right to receive . . . (cite) This right, regardless of social worth, (cite) is fundamental to our free society.³⁶

In *Winters v. New York*, the Court said, "Though we can see nothing of any possible value to society in these magazines (obscene ones), they are as much entitled to the protection of free speech as the best literature."³⁷ The

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state's argument was rejected. Constitutional protection "is not confined to the expression of ideas that are conventional or shared by a majority. . . ." In Justice Marshall's opinion the Court emphatically rejected Georgia's reasoning that obscene material leads to deviant sexual behavior or crimes of sexual violence:

. . . The state may no more prohibit mere possession of obscene matter on the grounds that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the grounds that they may lead to manufacture of homemade spirits.³⁹

The two cases, *Martin* and *Stanley*, implied that the right to receive could extend protection to previously unprotected speech. In *Martin*, the right of freedom of speech was extended and used to promote communication between willing listeners and speakers. The state still retained its right to time, place and manner restrictions.

In *Stanley*, the right to receive became the basis for a right to privacy. A person is entitled to receive any information and his right to privacy protects possession of that information in his own home. The state still retains the right to restrain dissemination and sale of obscene matter.

Receipt by Mail

The right to receive was vigorously pursued in the use of the United States Postal Service, not a semi-private organization at the time. Cases here involved the freedom to receive information through the mails. *Lamont v. Postmaster General*⁴⁰ dealt generally with the problem. Under the Postal Service and Federal Employees Salary Act of 1962, the Postmaster General was to deliver foreign mailings of "Communist political propaganda" only upon the addressee's request. The addressee had to return a card to postal officials before the material would be delivered. The statute contained exemptions for mail addressed to governmental agencies and educational institutions. Justice Douglas' opinion for the Court found Congress, expressly restrained by the First Amendment from abridging freedom of speech, setting "administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it and await a response before dispatching the mail."⁴¹

The Court believed the act was at war with the "uninhibited, robust and wide-open debate and discussion that are contemplated by the First Amendment."⁴² Justice William J. Brennan's concurring opinion agreed with the addressee's First Amendment claims:

They contend that the government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it."⁴³

Justice Brennan applied the First Amendment's underlying doctrinal basis and further strengthened the right to receive concept.

The Bill of Rights goes beyond the specific guarantees to protect from Congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully mean-

ingful. I think the ~~same~~ publications is such a fundamental right. It would be a barren marketplace if ideas had only sellers and no buyers.⁴⁴

Once the right was recognized as applicable to the mails, prisoners began using it to their benefit.

Prisons are a likely location for the expansion of right to receive application. There is some question as to what extent First Amendment rights apply to persons incarcerated and therefore already deprived of a portion of their civil rights. *Procunier v. Martinez*⁴⁵ addressed the problem, but the Court expressly denied dealing with the right to receive. Despite the denial, the outcome was apparently decided on a general right to receive theory.

Prison inmates challenged the mail censorship regulations in California. The regulations prohibited correspondence dealing in almost any manner with daily events in the jails. California's penal system was operating on the principle that personal correspondence by prisoners was "a privilege, not a right." Speaking for the Court, Justice Powell stressed that more than First Amendment rights of just the prisoners was involved:

In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.⁴⁶

Since communication was effected only when a letter was read by the addressee, censorship impinged on the interests of both parties. The Court's view of censorship as a restriction on the process of communication, rather than simply on the writing of words, represented a return to the original justification for a right to receive. By combining the writing and reading of letters into a concept of communication, interference with which would abridge the First Amendment, the Court was able to ignore the right to receive. It spoke instead in terms of government intrusion into communication—the letters. The Court said it did not

. . . depend on whether the nonprisoner correspondent is the author or the intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First Amendment and 14th Amendment a protection against unjustified governmental interference with the intended communication.⁴⁷

As in other circumstances, however, the state may employ censorship if its important and substantial interests are threatened. The Court cited as an example of a justifiable censorship letters that concerned escape plans.

The right to use the mails for personal correspondence secured, prisoners challenged the regulations controlling access to publications. If the First Amendment protects communication of ideas, prisoners thought they should be allowed access to different forms of communication.

In *Carpenter v. State*,⁴⁸ inmates challenged a ban on receipt of mail containing sexually explicit material. The Court upheld the ban on sexually explicit material, saying that a decision on whether it would have a detrimental effect on rehabilitation was within the discretion of prison officials. The Court said,

Consistent with the general rule, it has been held

that a prisoner retains the right to read what he wants unless the State can show a countervailing interest warranting censorship.⁴⁹

By sidestepping the right to receive issue in *Procunier*, the Supreme Court left unanswered the question of the extent of First Amendment rights retained by a prisoner. In the 8th Circuit Court of Appeals, prisoners had no overall right to receive, but the situation differed in the 7th Circuit.

Aikens v. Jenkins allowed the invalidation of a "prison regulation as overbroad which prohibited photographs and paintings of nudes unless incidental to a theme not designed primarily to arouse sexual desires."⁵⁰ Here, the right to receive was recognized but limited because of the person's status. "The First Amendment right of prisoners extends to published literature, but the right to receive information and ideas is more limited for prisoners than for other members of society."⁵¹ The consideration arises that since prisoners are in fact not members of society, because they can not vote, logically they do not fall within Meiklejohn's citizenry. The citizenry in a democratic society governs itself, but if prisoners are disenfranchised, they lose such a privilege. To apply the First Amendment political justification theory to prisoners, one must accept the theory of rational man that supposes all men are seekers of truth. In other words, though the political justification theory may not include prisoners within First Amendment rights, the underlying rationale that resulted in the First Amendment does include prisoners.

The Right to Hear

The right to hear is a phrase the Supreme Court uses synonymously for the right to receive. The right to hear terminology precisely illuminates the problem considered. As might be expected, such a right is discussed in the context of an audience receiving oral communication. One of the first cases dealing with this aspect of the First Amendment was *Thomas v. Collins*.⁵² R. J. Thomas, a union organizer, had a contempt conviction overturned. Thomas was cited for disobeying a restraining order forbidding him to speak at a meeting without the necessary permits. The rights of assembly and discussion are protected by the First Amendment. The Court said, "That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt."⁵³

The Supreme Court squarely considered the public's right to receive in *Kleindienst v. Mandel*.⁵⁴ Ernest Mandel, Belgian citizen and noted leftist journalist and scholar, was denied a nonimmigrant visa to enter the United States for a Stanford conference and lectures at universities throughout the country. He was denied entry under provisions of the Immigration and Nationality Act of 1952, which provides denial of admission to aliens who advocate world communism. The act has provisions for a waiver at the Attorney General's discretion and on recommendation of the Secretary of State or a consular officer. The complaint was filed by Mandel and several of the American university professors who had extended invitations. A three-judge district court held that although Mandel had no personal right to enter, citizens did have the right to have him enter the country in order to hear him explain and defend his views.⁵⁵

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The Supreme Court reversed the decision. It recognized the narrow issue of

... whether the First Amendment confers upon the appellee professors, because they wish to hear, speak and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country.⁵⁶

That is, was the refusal to admit Mandel a violation of the rights of American scholars and students? The Court was presented with a case directly involving the

... rights of American citizens to engage in political discussions and debate, to receive information and to inquire into the beliefs and opinions foreign to their present system of government.⁵⁷

The Court recognized that the right to receive is "nowhere more vital" than in schools and universities. Yet, the case was not decided on this right, but upon the need and power of the government to exclude aliens. The executive branch had a "facially legitimate" reason to bar Mandel (he had unknowingly violated the terms of entry on a 1968 visit), and the Court said it was not compelled to look behind

... the exercise of that discretion, not test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.⁵⁸

Justice Douglas in his dissent expressed considerations perhaps more in keeping with the philosophical foundation of the First Amendment as given earlier in this paper.

The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. ... Thought control is not within the competence of any branch of government.⁵⁹

The case was positive in the sense that the Court recognized the right to receive as a factor in the decision. Considering the *Lamont* decision, however, one wonders how the Court in *Mandel* could refuse so flatly to consider the claim that the act placed the State Department and Attorney General astride the flow of ideas from aliens of a particular political persuasion to American citizens. Are not letters and speeches both forms of communication protected under the First Amendment?

Two lower court cases dealt specifically with the right to receive in schools. *Brooks v. Auburn University*⁶⁰ concerned the right to hear. The Reverend William Coffin Sloan was scheduled to speak at the University when the school's president cancelled the engagement. The court held that the

... First Amendment, applicable to a state university through the 14th amendment, embraces the right to know. ... That the right of faculty and students to hear a speaker ... cannot be left to the discretion of the university president on a pick and choose basis.⁶¹

In *Minarcini v. Strongsville City School District*,⁶² students and parents brought suit because the school board

had ordered removal of certain books from the library. The court said,

We recognize . . . we deal with a somewhat more difficult concept than a direct restraint on speech. Here we are concerned with the right of students to receive information which they and their teachers desire them to have.⁶²

Broadcasting

Another area of communication that seems naturally open to right to receive litigation is broadcasting. The rules and regulations imposed upon broadcasters seem to obviate consideration of the First Amendment. Yet it is within this highly controlled medium that government attempts to instill some form of freedom of speech by insisting that diverse, dissonant ideas be heard. At least, that is the underpinning conception of Section 315 of the U.S. Codes (47 USC 315) and the Fairness Doctrine. Barron's right to access contention makes much of statistics that show there are three times as many radio stations as newspapers. So it is by far the larger medium that is regulated.

A dilemma appears. Broadcasting is large enough to offer the diverse viewpoints so coveted by the Constitution's framers, but it is powerful and pervasive enough to have such an impact that the government feels it must be controlled. But that control insists upon the right of the public to be informed. In broadcasting,

The purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government or a private licensee."⁶⁴

The phrase "public interest" first appeared in the Federal Radio Commission Act of 1927 and is taken as the catch phrase imposing a duty on broadcasters to discuss both sides of controversial public issues. The commission was established to allocate frequencies in a manner responsive to the public "convenience, interest or necessity." The Court said in *Red Lion Broadcasting Co. v. FCC*, "'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public."⁶⁵ The Court likewise recognized the need for regulation:

Although broadcasting is clearly a medium affected by a First Amendment interest, the differences in the characteristics of new media justify differences in the First Amendment standards applied to them.⁶⁶

The ability of the licensee to render the best service in the public interest of a community had been the basis for several Court decisions.⁶⁷

Broadcasters' guideposts are Section 315 and the corollary Fairness Doctrine. The law and the rule assume that the public has a right to have the available media function harmoniously with the requirements of the First Amendment. Citizens must be kept informed and have the right to receive that information. The Supreme Court elaborated in *Red Lion* on the importance of the airwaves in the dissemination of information to keep the public

informed.

People as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC.⁶⁸

But the Fairness Doctrine does not require individual access. Its presumed effect is one of enhancing the volume and quality of coverage of public issues. The concept of the public's right to be informed encourages mandatory comment on controversial issues. The Fairness Doctrine "was evolved to require that the broadcaster's coverage of important public issues must be adequate and must fairly reflect differing viewpoints."⁶⁹ Application of the standard is, however, difficult. It is hard to establish standards to determine when the obligation is triggered. The FCC's lack of aggressiveness in pursuing a policy requiring licensees to initiate programming dealing with controversial issues allows licensees to control and manipulate discussion. The FCC's ultimate course is to use its sanction of license nonrenewal to prevent violations of the First Amendment.

Commercial Speech

The last several years have witnessed the rising power of consumer groups. These groups assert the right of the public to receive in the area of commercial speech. All that has gone before spoke of political theory and controversial issues, but it is the movement to acquire information that directly affects one's pocketbook that is proving the current existence of the public's right to receive. Commercial transactions may affect individuals more intimately and seriously than political discussions. An informed economic choice is as valuable to a democratic capitalist society as informed political choice. In some cases, the effect of advertising on society may be even greater than the impact of political thought.

In 1942, the Supreme Court stated in *Valentine v. Chrestensen* (316 U.S. 52) that the Constitution afforded no protection to commercial activity. But the decision has since been discredited: advertising represents dissemination of information and ideas. The Court stated in *NAACP v. Button* that "a state cannot foreclose the exercise of constitutional rights by mere labels."⁷⁰

One of the new group of cases to consider the right to receive in a commercial speech context was *Bigelow v. Virginia*.⁷¹ A newspaper editor published an advertisement for a New York abortion clinic. A Virginia statute made it a misdemeanor to encourage or prompt procuring of an abortion. The Supreme Court reversed the editor's conviction.

The Court believed Virginia was really asserting an interest in regulating what Virginians might hear or read about New York services. Such thought control is not within the state's power. The case was not argued by the editor on right to receive grounds, though the Court recognized the right's involvement. The advertisement conveyed information of potential interest and value to a "diverse

audience."

*Griswold v. Connecticut*⁷² recognized the right to receive more directly. A Connecticut statute made the use of contraceptives a criminal offense. Directors of a planned parenthood league were convicted of giving advice and information to married persons about the use of contraceptives. Emphasizing that the state can not contract the spectrum of available knowledge, the Supreme Court reversed the decision. Justice Douglas' ruling opinion provided the reasoning:

The right of freedom of speech and press includes not only the right to utter or to print but the right to distribute, the right to receive, the right to read (cite) and freedom of inquiry, freedom of thought, and freedom to teach. . . .⁷³

Justice Arthur Goldberg, searching for further rationale for protection of speech in the case said, "I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."⁷⁴ Another proponent of the political justification theory was found.

The courts continued to move into new areas asserting the right to receive. With advertising now within the acceptable boundaries of the First Amendment, information bearing directly on Americans' pocketbooks was sought. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*⁷⁵ brought drug price advertising under constitutional protection. A Virginia statute had made it unprofessional conduct for a pharmacist to advertise prescription drug prices. Since prices were a matter of public interest, the Court said they were protected. Justice Blackmun's ruling opinion recognized the ludicrous situation posed if advertisers were merely advertising to a void.

Freedom of speech presupposes a willing speaker; where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipient both.⁷⁶

Specifically, "if there is a right to advertise, there is a reciprocal right to receive advertising. . . ."⁷⁷ Information becomes communication when it reaches the mind of the receiver, analogous to the letters as communication in *Procurier*. In this particular instance, First Amendment interests in the free flow of price information outweighed any countervailing interests of the state.

Persons interested in their health and the conservation of economic resources have as much right to be informed as the citizen about to vote in an election. "It is a matter of public interest that those decisions (economic) . . . be intelligent and well informed."⁷⁸ The free flow of information serves society well. Again, the Court asserted the underlying concept of the First Amendment:

The alternative (to state control) is to assume this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communica-

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tion rather than to close them.⁷⁹

Other cases have applied similar reasoning to advertising for food,⁸⁰ eyeglasses⁸¹ and realty.⁸²

Consumers seeking information are now forcing the publication of doctors' and attorneys' fees. *Health Systems Agency v. Virginia Board of Medicine*⁸³ discussed the issue of whether citizens "have a constitutional right to gather, publish and receive information about the services and fees of physicians practicing in their community."⁸⁴ The Court found that they did. The interest of the public dictated the need for information. Indeed, given the basic First Amendment theory, all information impacting on a citizen's life should be open to him.

The most recent bastion to fall has been advertising of attorneys' fees. Two Arizona lawyers turned to advertising in an attempt to draw business to their legal clinic. The resulting ad, in violation of state bar rules, offered "legal services at very reasonable fees." The case of *Bates v. State Bar of Arizona*⁸⁵ reached the Supreme Court, where Justice Blackmun, in a 5-4 decision, wrote:

The listener's interest is substantial: The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue . . . commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. (cite) . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.⁸⁶

Blackmun emphasized that the issue before the Court was a narrow one. Lawyers would be allowed to advertise prices of "certain routine legal services." State bar associations would be responsible for formulating advertising regulations.

Conclusion

The right to receive—does it exist? This paper has demonstrated that the philosophical underpinnings of the First Amendment do allow the existence of such a right, almost demand it. If man is a rational, thinking being, his ultimate calling is to seek the truth. Information must be available. In our society, each citizen governs and must therefore have the tools necessary to make decisions. The Supreme Court first recognized the right in the abstract in *Martin* and has recently applied the right to our everyday lives in its decisions regarding commercial speech. It is in these latter decisions, which affect the pocketbook, that we may be most willing to fight for the right and receive its direct benefits. The press, as the public's proxy, must continue its work of inquiring and informing so that our right may be exercised.

FOOTNOTES

1. Thomas J. Emerson, "Toward a General Theory of the First Amendment," *Yale Law Journal*, April, 1963, p. 877.
2. *Ibid.*, p. 879.
3. *Procurier v. Martinez*, 416 U.S. 396 (1974), Justice Marshall's concurring opinion.
4. *Dennis v. U.S.*, 341 U.S. 494 (1951).
5. *Thomas v. Collins*, 323 U.S. 516, 448; 89 L. Ed. 430 (1945), Justice Jackson's concurring opinion.

6. Alexander Meiklejohn, *Political Freedom* (New York: Oxford Press, 1965), p. 6-7.
7. *Ibid.*, p. 13.
8. Emerson, p. 882.
9. *Abrams v. U.S.*, 250 U.S. 616 (1919).
10. Meiklejohn, p. 39.
11. *Ibid.*, p. 28.
12. *Naar v. Minnesota*, 283 U.S. 697 (1931).

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13. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).
14. *New York Times v. Sullivan*, 376 U.S. 254, 701 (1964).
15. *Bigelow v. Commonwealth of Virginia*, 421 U.S. 809, 823 (1975).
16. *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).
17. *Mekiejohn*, p. 57.
18. *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972).
19. *Emerson*, p. 883.
20. *Mekiejohn*, p. 81.
21. *Jerome Burton*, "Access to the Press—A New First Amendment Right," *Harvard Law Review*, June, 1963, p. 1641.
22. *Ibid.*, p. 1646.
23. *Ibid.*, p. 1647-8.
24. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
25. *Respectively*, *Estes v. Texas*, 381 U.S. 332 (1965); *Virgil v. Time, Inc.*, 527 F.2d 1122 (1975); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).
26. *AP v. U.S.*, 326 U.S. 1, 29 (1945).
27. "The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations," *Georgetown Law Journal*, February, 1975, p. 775.
28. *Ibid.*, p. 777.
29. *Martin v. Struthers*, 319 U.S. 141 (1943).
30. *Ibid.*, at 143.
31. *Ibid.*, at 146-7.
32. *Schneider v. Ohio*, 308 U.S. 147 (1939).
33. *Ibid.*, at 162.
34. *Stanley v. Georgia*, 394 U.S. 557 (1969).
35. *Roth v. U.S.*, 354 U.S. 476 (1957).
36. *Stanley v. Georgia*, 89 S.Ct. 1243, 1247 (1969).
37. *Winters v. New York*, 333 U.S. 507, 510 (1948).
38. *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959).
39. 89 S.Ct. at 1249.
40. *Lamont v. Postmaster General*, 381 U.S. 301 (1965).
41. *Ibid.*, at 306.
42. *Ibid.*, at 307.
43. *Ibid.*, at 308.
44. *Ibid.*
45. 416 U.S. 396.
46. *Ibid.*, at 408.
47. *Ibid.*, at 408-9.
48. *Carpenter v. South Dakota*, 536 F.2d 759 (1976).
49. *Ibid.*, at 761.
50. *Aikens v. Jenkins*, 534 F.2d 751 (1976).
51. *Ibid.*, at 752, headnotes.
52. 89 L.Ed. 430.
53. *Ibid.*, at 442.
54. 408 U.S. at 753.
55. *Mandel v. Mitchell*, 325 F.Supp. 620 (1971).
56. 408 U.S. at 762.
57. "The First Amendment and the Public Right to Information," *University of Pittsburgh Law Review*, 1973/74, p. 93.
58. 408 U.S. at 770.
59. *Ibid.*, at 771-2.
60. *Brooks v. Auburn University*, 412 F.2d 1171 (1969).
61. *Ibid.*, at 1172.
62. *Minarcini v. Strongsville City School District*, 541 F.2d 577 (1976).
63. *Ibid.*, at 583.
64. "Fogarty Asserts Minow's Wasteland Hasn't Flowered," *Broadcasting*, Jan. 31, 1977, p. 45.
65. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 385 (1969).
66. *U.S. v. Paramount, Inc.*, 334 U.S. 131, 166 (1948).
67. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *FCC v. Allentown*, 349 U.S. 358 (1955).
68. 395 U.S. at 390.
69. *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 95 (1973).
70. *NAACP v. Button*, 371 U.S. 415, 429 (1963).
71. 421 U.S. 809.
72. *Griswold v. Connecticut*, 381 U.S. 479 (1973).
73. *Ibid.*, at 514.
74. *Ibid.*, at 516.
75. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 48 L.Ed. 346 (1976).
76. *Ibid.*, at 348.
77. *Ibid.*, at 355.
78. *Ibid.*, at 360.
79. *Ibid.*, at 363.
80. *Anderson, Clayton and Co. v. Washington State Department of Agriculture*, 402 F.Supp. 1253 (W.D. 1975).
81. *Terminal-Hudson v. Department of Consumer Affairs*, 407 F. Supp. 1075 (C.D. Cal. 1976).
82. *Linmark Associates, Inc. v. Willingboro*, 45 U.S. Law Week 4441 (1977).
83. *Health Systems Agency v. Virginia Board of Medicine*, 2 Med.L.Rptr. 1107 (1976).
84. *Ibid.*, at 1108.
85. *Bates v. State Bar of Arizona*, 97 S.Ct. 2691 (1977).
86. *Ibid.*, at 2699.

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